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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE SAEED-UR-REHMAN FARRUKH

JAIL CRIMINAL APPEAL NO.223/I OF 2000 **L/W CRL.S.M.8/I OF 2004**

1. Muzaffar Ali alias Jaffar -- son of Barkat Ali,resident of Dhobi Ghat Baghbanpura, Lahore.		Appellants
2. Muhammad Mansha son of Muhammad,Resident of Qaudi-e-Millat Colony, Chungi Amarsadhu, Lahore.		
3. Muhammad Anwar son of Khadim Hussain,Resident of Qauid-e-Millat Colony, Chungi Amarsadhu,Lahore.		
4. Zahid Hussain son of Abdul-Ghafoor,resident of Mohallah Islamabad Darman Road, Tehsil Shakker Garh,District, Narowal.		
	Versus	
The State	--	Respondent
Counsel for the appellants	--	Miss Gazala Shereen, Advocate.
Counsel for the State	--	Mr.Fazal-ur-Rehman Rana, Advocate.
No.date of FIR and Police station	--	No.465 dated 11.10.1991 P.S.Kahna, Lahore.
Date of the order of Trial Court	--	8.12.2000
Date of institution	--	26.12.2000
Date of hearing	--	19.9.2005
Date of decision	--	19.9.2005

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 8.12.2000 passed by the learned Additional Sessions Judge, Lahore whereby appellants namely Muzaffar Ali alias Jaffar s/o Barkat Ali, Muhammad Mansha s/o Muhammad, Muhammad Anwar s/o Khadim Hussain and Zahid Hussain s/o Abdul Ghafoor were convicted and sentenced as under;-

Under section 324 PPC-- Ten years R.I. and a fine of Rs.10,000/- or in default thereof to further undergo S.I. for three years;

Under section 394 PPC-- Life imprisonment; and

Under section 460 PPC--Ten years R.I. and a fine of Rs.10,000/- or in default to further undergo S.I. for two years.

All the substantive sentences of imprisonment were ordered to run consecutively.Benefit of section 382-B Cr.P.C.was,however, extended to the appellants.

2. Facts of the case, in brief, are that on 11.10.1991, report was lodged by one Mst.Rukhsana wife of Niamat Ali with police station Kahna, District Lahore wherein, it was alleged that in the previous night,

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the complainant alongwith her family members, were sleeping in her house. At about 3.00 a.m. some body knocked at the door of their house. Resultantly, both, the complainant and her husband, awoke up and saw through window that four persons were standing outside their house. The complainant and her husband, therefore, raised alarm whereupon, three culprits whose description by appearance was duly given in the FIR, entered in their house by scaling over a wall. They also forced their entry in their residential room by removing internal door thereof. As the culprits directed her husband to hand them over valuables, he i.e. Niamat Ali offered resistance, whereupon one of the culprits fired at him in the abdomen. It was further alleged by the complainant that all the three culprits after taking golden ornaments, as well as cash from them also entered the room wherein, her parents in-laws were sleeping. There, they also committed theft after causing severe injuries to her parents in-laws. On the alarm raised by them, however, since inhabitants of the locality, were attracted, therefore, the culprits fled. After their departure, the

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FIR bearing No.465 dated 11.10.1991 was registered at the said police station and investigation was carried out in pursuance thereof. On the completion of investigation the appellants were challaned to the Court for trial under section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

3. It would be pertinent to mention here that accused persons were, on 20.4.1994, initially charged under section 17(2)(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 but thereafter the charge was amended and they were charged under section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 alongwith sections 148, 302,460,324 and 149 PPC, to which they pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations leveled against the accused persons produced nine witnesses, in all. P.W.1 Mst.Rukhsana Bibi is the complainant. She, while reiterating the version contained in the FIR, stated that in committing the offence of robbery not only the accused persons caused

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bullet injury to her husband in his abdomen but also pricked eyes of her parents in-law with the help of a paroquet, (the tool which is normally used to break the ice blocks) besides injuries were also caused on their heads which ultimately caused their death. She added that she was also subjected to zina-bil-jabr by the culprits. P.W.2 Niamat Ali is the husband of the complainant and injured eye-witness. He, while corroborating the statement of P.W.1 in all material particulars, deposed that his parents died later on due to the injuries sustained during the occurrence. P.W.3 Sardar Ahmad, Constable is a marginal witness of the recovery memo Exh.P.E vide which mattress, pillow, a bed-sheet, a dopatta, a female trousers,one bed-sheet, a Tehmad all blood stained, were taken into possession by the I.O. He is also a marginal witness of the recovery memos Exhs.PF and PG, vide which a blood stained 'danda' and blood stained earth, were taken into possession by the police from the place of occurrence. P.W.4 Muhammad Nasrullah, Head Constable is a marginal witness of the recovery memos, Exhs.PK,PL and PM, vide which gold ornaments alongwith other articles were

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recovered from the possession of the accused persons namely, Muhammad Mansha, Muzaffar Ali and Muhammad Zahid at their instance and taken into possession by the police accordingly. P.W.5 Muhammad Zaman, Inspector, had after recording statement/fard-e-Biyan, i.e. Exh.PA, sent the same to P.S. for formal registration of the case. He had also partially investigated the case. P.W.6 Muhammad Ibrahim, ASI, had, on the receipt of complaint, registered the formal FIR i.e. Exh.PA/1. P.W.7 Muhammad Asghar is a marginal witness of the recovery memo, Exh.PN, vide which a golden 'nath' was recovered and taken into possession by the police at the instance of accused Muhammad Ashraf. He is also a marginal witness of the recovery memos Exhs.PO and PQ vide which two golden rings i.e. Articles P.4 and P.5, were recovered by the police from the possession of the accused persons namely, Anwar and Liaqat at their instance. P.W.8 Muhammad Sharif, Inspector, Range Crime Branch, had also partially investigated the case. P.W.9 Jaffar Hussain Bhatti, Magistrate Ist Class, Lahore, had

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on 23.5.1992, supervised test identification parade of the appellants. He produced memo thereof as Exh.PS.

5. On the conclusion of the prosecution evidence, the accused persons were examined under section 342 Cr.P.C. In their above statements, all the accused persons denied the charge and pleaded innocence. They, however, failed to lead any evidence in their defence or to appear themselves as their own witnesses in terms of section 340(2) Cr.P.C.

6. After hearing the arguments of the learned counsel for the parties, the learned trial Judge convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof. However, acquitted them from the charge of zina, as in the opinion of the learned Judge, in the absence of any specific allegation in the FIR and the medical evidence, it was not substantiated by the prosecution.

7. It would be pertinent to mention here that during pendency of the appeal an application i.e. Criminal Misc. No. 210/I of 2001 was submitted by the learned counsel for the State for taking additional

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evidence thereby recording statement of the doctor who had earlier examined the deceased persons as it was not conspicuous on record as to what was the cause of their death, whether it were the injuries sustained by them at the time of occurrence or otherwise? The application was allowed and trial Judge was ordered that the prosecution be permitted to examine the concerned doctor with opportunity of cross-examination by the defence. It was further ordered that thereafter, the accused persons be re-examined under section 342 Cr.P.C. and they be confronted with all the incriminating material with opportunity of rebutting the same through evidence, if required. The needful was done and Dr.Zubair Chawla was examined as P.W.10, who produced the MLRs issued by him as Exh.PW-10/A to Exh.PW-10/F, qua Mst.Hussain Bibi and Exh.PW-10/G to Exh.PW-10/N qua Ilam Din deceased. It would not be out of place to mention here that on 16.2.2004 yet, another application i.e. Crl.Misc.No.20/I of 2004 was filed by the learned counsel for the State praying that since the purpose of examination of doctor Zubair Chawla, primarily, was to ascertain the

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fact as to whether the injuries sustained by Ilam Din and Mst.Hussain Bibi deceased persons, during the occurrence, had any nexus with their death or not and the evidence by the doctor fell short of not only covering the whole period spent in the hospital by the deceased persons but it provided no answer to the question regarding the cause of their death, therefore, the said witness alongwith record of the hospital covering the whole period spent by the deceased persons therein, may be permitted to be summoned and prosecution may be afforded yet, an opportunity to re-examine him. Since application was not opposed by the learned counsel for the appellant, therefore, the same was allowed vide order dated 16.2.2004 and in pursuance thereof the witness was re-called and re-examined on 5.5.2004 and 29.5.2004. The accused persons too, were re-examined under section 342 Cr.P.C.

8. We have heard Miss Gazala Shereen, advocate for the appellants, Mr.Fazal-ur-Rehman Rana, Advocate, learned counsel for the State and have also perused the entire record with their assistance, carefully.

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9. Miss Ghazala Sherin, Advocate, learned counsel for the appellants has contended that since both the eye-witnesses i.e. P.W.1 and 2 were related inter se, therefore, they were not worthy of credence; that since it was not proved on record that both Mst.Hussain Bibi and Ilam Din died because of the injuries sustained by them during the occurrence and it was not conspicuous as to who out of several accused persons was responsible for causing the same, therefore, the sentences inflicted on the appellants, were harsh, more so when it were made consecutive.

10. Mr.Fazal-ur-Rehman Rana, Advocate, learned counsel for the State, on the other hand, has submitted that FIR in the case was lodged promptly wherein, description by appearance of all the culprits was not only given but specific roles were also attributed to each of them. The accused persons after their arrest were put to identification test wherein, they were correctly identified by the eye-witnesses and in Court, as well, hence, there was no doubt about their identity. The recovery of robbed property from the possession of the accused persons after their arrest lends further support to the prosecution version. The complainant or

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P.W.2 have had neither any enmity with the accused persons nor had they any motive to falsely implicate them in the offence, therefore, their testimony was rightly believed by the learned trial Judge. He added that though both the eye-witnesses i.e. the complainant as well as Niamat Ali being husband and wife, were related inter se and also to the deceased persons yet, they were quite independent witnesses. Rather, both being victims of the crime were natural witnesses. As regards the quantum of sentence he submitted that since in committing the offence of robbery injuries were caused to the deceased persons as well as P.W.2 Niamat Ali which was grievous in nature and the possibility that Mst.Hussain Bibi and Ilam Din died because of the injuries sustained by them, during the occurrence, could not have been ruled out, therefore, the sentences inflicted on the appellants, were proper.

11. We have given our anxious consideration to the respective contentions of the learned counsel for the parties. The prosecution case is based on the ocular testimony of P.W.1 Mst.Rukhsana Bibi, the complainant and P.W.2 Niamat Ali, her husband; the recovery of robbed

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property i.e. ornaments etc from the possession of the appellants, evidence of identification of the appellants, at the test as well as in Court, the medical evidence and the circumstantial evidence. In the instant case, not only the FIR was lodged promptly i.e. soon after the occurrence at 6.15 in the next morning but description by appearance of all the culprits was given therein. Further, specific roles were also attributed to each of them. All the appellants after their arrest were put to identification test wherein, they were correctly identified by P.W.2 Niamat Ali, the injured eye-witness. They were also correctly identified, at the trial by both the eye-witnesses. The evidence of recovery of robbed property at the instance of the appellants from their possession lends further support to the prosecution version and testimony of the eye-witnesses is also corroborated by the medical evidence which is indicative of the fact that both the eye-witnesses as well as the deceased persons sustained grievous injuries. Though the learned State counsel has tried its best to substantiate that both Mst.Hussain Bibi and Ilam Din died because of the injuries sustained by them during the occurrence and

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for that purpose P.W.10 Dr.Zubair Chawla during pendency of the appeal was also got examined by way of additional evidence, he was re-called and re-examined, as well and record of the hospital was also summoned but since, after death, post mortem examination of both the deceased persons was not got conducted, therefore, due to this inherent defect it could not be proved that the injuries sustained by both the deceased persons during the occurrence ultimately caused their death. It would be pertinent to mention here that Dr.Zubair Chawla while re-called and re-examined, has in his statement, pointed out that Mst.Hussain Bibi expired due to cardio pulmonary arrest and that the diagnosis was old head injury but since the patient was, in the meantime, operated upon for removal of sub dural hygroma by burr holes on 16.10.1991 and 23.10.1991 by Dr.Nadeem and Dr.Shahzad, respectively and they were not produced at the trial, therefore, it cannot be concluded with certainty that both the deceased persons lost their lives because of the injuries sustained by them during the occurrence but one thing is certain that injuries caused by the appellants to the deceased persons as

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well as Niamat Ali were grievous in nature. Niamat Ali was fired at in the abdomen and it was his good luck that he recovered whereas, deceased persons Ilam Din and his wife Mst.Hussain Bibi, who both were more than 65 years of age were having gun shot wounds on their heads. Statement of Dr.Zubair Ahmad, P.W.10 is indicative of the fact that Mst.Hussain Bibi was having elucidate fire arm wound, 1 x ½ cm, of oval shape with blackening around the margin of the wound going deep on right of fore-head just above outer of right eye-brow and it was in the opinion of the doctor dangerous to life and Ilam Din deceased was also having, at-least, two grievous injuries on the right side of his head i.e. a lacerated wound 3 cm into ½ cm muscle deep on right side of his head. A lacerated wound 6 x 1 cm scalp deep on the left side of his head and another lacerated wound 7 x ½ cm scalp deep back on right side of his head and he was vomiting blood as well, besides eyes of both the deceased persons were also pricked, in brutal manner. Doctor was of the opinion that injury sustained by Niamat Ali was also dangerous to his life. Hence, in our view, sentences inflicted on the appellants by the

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learned trial Judge are not only just and proper but fully commensurate with gravity of the offence, as well.

12. We are mindful of the fact that sentences of imprisonment inflicted on the appellants, in this case, have not been made concurrent. On the contrary, it has been specifically ordered by the learned trial Judge that substantive sentences of imprisonment recorded against each of the appellants, on all counts, would run consecutively which, in aggregate, comes to about 45 years i.e. life imprisonment under section 394 PPC, which has though not been defined, yet, as per section 57 PPC, in calculating fractions of the terms of punishment is equated with twenty-five years imprisonment ; ten years under section 324 PPC and further ten years under section 460 PPC, which though appears to be excessive, yet keeping in view gravity of the offence, that two persons were killed and injuries were caused in such a brutal manner they were not only fired at in their heads but their eyes were also pricked and one i.e. Niamat Ali was fired at in the abdomen, the appellants should thank their stars that they have escaped the capital punishment for want of

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evidence to the effect that injuries caused to both, Ilam Din and Mst.Hussain Bibi during the occurrence were the death blows. It would be pertinent to mention here that notices were issued to the appellants by this Court vide order dated 15.9.2004 and they were called upon to show as to why appropriate sentences under the law be not inflicted on them.

Learned counsel for the appellants has also tried to canvass that in view of the bar contained in proviso (a) to section 35 Cr.P.C. appellants could not have been sentenced to more than a life span but, we are afraid the argument cannot prevail for the simple reason that in some of the cases i.e. Javed vs. The State 1985 SCMR 157, Muhammad Khan vs. The State 1986 SCMR 157; Muhammad Ittifaq vs. The State 1986 SCMR 1627 and Khani Zaman and another vs. The Stater 1987 SCMR 1382, though the view expressed by the Apex Court was that in view of the proviso (a) to sub-section (2) of section 35 Cr.P.C. a person cannot be convicted for more than his life span yet, since the controversy was finally set at rest and the view expressed in the afore-quoted judgments was reviewed in the case of Bashir and three others vs. The State PLD

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1991 SC 1145 whereby it was laid down that proviso, in question, does not apply to the sentences awarded by the Sessions Judge in original trial, as its application was limited to the trial of cases by the Magistrate as well as Assistant Sessions Judges, wherever in existence, therefore, except the case, in which, the sentence of death is commutated/commuted under an executive order, the sentences of life imprisonment unless ordered to run concurrently under sub-section (1) of section 35 Cr.P.C., will run consecutively in view of its quantification in terms of order under section 57 of the Pakistan Penal Code. Hence, the learned Court below was legally competent to order that the sentences inflicted on the appellants would run consecutively but, in view of the bar contained in Article 13 of the Constitution of the Islamic Republic of Pakistan as well as 403 Cr.P.C., which provides that no body can be tried and punished twice for the same offence, we feel that sentences of imprisonment inflicted on the appellants under sections 460 and 324 PPC should not have been ordered to run consecutively with the sentences inflicted on the appellants under section 494 PPC because all

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the offences being compound offences certain parts thereof overlap each other so far as infliction of punishment thereunder is concerned. Here, it would be worthwhile to mention that section 394 PPC provides punishment for "causing hurt in committing robbery", or in attempting to commit robbery whereas section 324 PPC provides punishment for "attempt to commit qatl-e-amd" and the offence of "attempt to commit qatl of, or hurt to, any person in committing lurking house trespass" is culpable by section 460 PPC. So far as the punishment inflicted on the appellants under section 394 PPC is concerned, that is quite justified because the appellants have been found responsible for voluntarily causing hurt in committing robbery. However, fact of the matter is that under section 394 PPC enhanced punishment "for causing hurt" in course of robbery, has been inflicted on the appellants and since the offence of robbery punishable under section 392 PPC carries a maximum sentence of ten years imprisonment alongwith fine, therefore, infliction of sentence under section 324 PPC, "for injuries caused", appears to be the duplication of sentence. Likewise, since under section

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460 PPC too, "enhanced punishment" for committing the offence of house trespass by night in order to commit "an attempt or qatal or hurt to any person" has been inflicted and section 456 PPC, which provides punishment for the offence for lurking house trespass by night, too, carries a maximum sentence of three years imprisonment only alongwith fine, therefore, the sentence inflicted, in excess thereof, under section 460 PPC again appears to be duplication of the sentence.

13. The upshot of the above discussion is that this appeal is hereby dismissed. Convictions and sentences recorded against the appellants, namely, Muzaffar Ali alias Jaffar son of Barkat Ali, Muhammad Mansha son of Muhammad, Muhammad Anwar son of Khadim Hussain and Zahid Hussain son of Abdul Ghafoor, under sections 324, 394 and 460 PPC, by the learned Additional Sessions Judge, Lahore vide judgment dated 8.12.2000 are maintained. Consequently, notices issued to the appellants for enhancement of sentences are recalled. The sentences of imprisonment inflicted on the appellants under sections 324 and 460

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PPC, shall, however, run concurrently with the sentence inflicted on the appellants under section 394 PPC and inter se, as well.

These are the reasons for our short order of the even date.

(Ch.Ejaz Yousaf)
Chief Justice

(Dr.Fida Muhammad Khan)
Judge

(Saeed-ur-Rehman Farrukh)
Judge

Islamabad,dated the
19th September, 2005
ABDUL RAHMAN/**

FIT FOR REPORTING

Chief Justice